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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 20, 2004

Case No.: TIA-0272

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late mother (the Worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept

a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a laboratory technician at DOE's Savannah River site (the site) for approximately twenty-eight years, from 1954 to 1982. The Applicant filed an application with OWA, requesting physician panel review of two illnesses - emphysema and chronic obstructive pulmonary disease (COPD).

The Physician Panel rendered a negative determination on the claimed illnesses. The Panel considered the claimed emphysema and COPD as one illness, stating that the two are essentially synonymous. After considering the Worker's record, the Panel agreed that the Worker was likely exposed to various toxins during the course of her employment at the site, but that those occupational exposures were not the cause of her illness. The Panel stated that it was "not aware of any specific toxins that would produce the degree of emphysema [the Worker] developed." Panel Report at 1. The Panel stated that the most likely cause of the Worker's illness was her long history of smoking. The OWA accepted the Physician Panel's negative determination and the Applicant filed the instant appeal.

In his appeal, the Applicant contends that the Worker was exposed to several toxic substances during her long period of employment at the site. The Applicant acknowledges that the Worker's smoking may have contributed to the seriousness of her illness, but contends that the smoking was not the direct cause of the illness.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure

during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

The Applicant's appeal does not present a basis for finding Panel error. In making its determination, the Panel considered the length of the Worker's employment and the Worker's occupational exposures. Consequently, the Applicant's contention that smoking was not the direct cause of the Worker's illness is a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error.

As the foregoing indicates, the appeal does not provide a basis for finding Panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0272 be, and hereby is, denied.
- (2) This denial pertains only to the DOE appeal and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 11, 2005